



DALLAS COUNTY
DISTRICT ATTORNEY
JOHN VANCE
Appellate Division

JUN 24 93

Opinion Committee

RQ-570

June 23, 1993

Mr. Rick Gilpin, Chairman
Attorney General's Opinion Committee
P.O. Box 12548
Capitol Station
Austin, Texas 78711

MBJ
2Q-00570-DM
~~416-888-7513~~
FILE #
I.D.# 20823

RE: Request for Attorney General's Opinion
Interpreting TEX. PENAL CODE ANN. § 46.05

Dear Mr. Gilpin:

Several weeks ago our office was contacted by attorneys with the Bureau of Alcohol, Tobacco and Firearms concerning an interpretation of state law, specifically TEX. PENAL CODE ANN. § 46.05. As outlined in an attached follow-up letter from Bobby Tyler, Assistant Chief Counselor for ATF's Dallas Office, ATF is interested in this section of our Penal Code because amendments to the federal Gun Control Act of 1968 (18 U.S.C. Chapter 44) and federal regulations make relevant State law determinative as to firearms disabilities imposed by the federal Gun Control Act.

Because the answer to the question submitted by the ATF will impact the federal government's enforcement of federal law throughout Texas, I believe that this issue should be resolved through means of an Attorney General's opinion as opposed to an informal opinion from this office.

1. Question Presented:

Is a person guilty of an offense under TEX. PENAL CODE ANN. § 46.05, when he possesses a firearm away from the premises where he lives, if that person:

- 1) was convicted of a felony involving violence or threatened violence to a person or property,
- 2) placed on regular probation, and
- 3) has been discharged from probation pursuant to Section 23 of TEX. CODE CRIM. PROC. ANN. art. 42.12, but was not specifically released from all penalties and disabilities by the order of the trial court discharging him from probation?

2. Relevant Statutes:

A) TEX. PENAL CODE ANN. § 46.05 provides:

§46.05. Unlawful Possession of Firearm by Felon

(a) A person who has been convicted of a felony involving an act of violence or threatened violence to a person or property commits an offense if he possesses a firearm away from the premises where he lives.

(b) An offense under this section is a felony of the third degree.

B) TEX. CODE CRIM. PROC. ANN. art. 42.01 provides:

Art. 42.01. Judgment

Sec. 1. A judgment is the written declaration of the court signed by the trial judge and entered of record showing the conviction or acquittal of the defendant. The sentence served shall be based on the information contained in the judgment. The judgment should reflect:

1. The title and number of the case;

2. That the case was called and the parties appeared, naming the attorney for the state, the defendant, and the attorney for the defendant, or, where a defendant is not represented by counsel, that the defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel;
3. *The plea or pleas of the defendant to the offense charged;*]
4. Whether the case was tried before a jury or a jury was waived;
5. The submission of the evidence, if any;
6. In cases tried before a jury that the jury was charged by the court;
7. The verdict or verdicts of the jury or the finding or findings of the court;
8. In the event of a conviction that the defendant is adjudged guilty of the offense as found by the verdict of the jury or the finding of the court, and that the defendant be punished in accordance with the jury's verdict or the court's finding as to the proper punishment;
9. In the event of conviction where death or any nonprobated punishment is assessed that the defendant be sentenced to death, a term of imprisonment, or to pay a fine, as the case may be;
10. In the event of conviction where any probated punishment is assessed that the imposition of sentence is suspended and the defendant is placed on probation, setting forth the punishment assessed, the length of probation, and the probationary terms and conditions;
11. In the event of acquittal that the defendant be discharged;
12. The county and court in which the case was tried and, if there was a change of venue in the case, the name of the county in which the prosecution was originated;
13. The offense or offenses for which the defendant was convicted;

14. The date of the offense or offenses and degree of offense for which the defendant was convicted;

15. The term of sentence;

16. The date judgment is entered;

17. The date sentence is imposed;

18. The date sentence is to commence and any credit for time served;

19. The terms of any order entered pursuant to Article 42.08 of this code that the defendant's sentence is to run cumulatively or concurrently with another sentence or sentences;

20. The terms of any plea bargain;

21. Affirmative findings entered pursuant to Subdivision (2) of Subsection (a) of Section 3g of Article 42.12 of this code;

22. The terms of any fee payment ordered under Articles 37.072 and 42.151 of this code;

23. The defendant's thumbprint taken in accordance with Article 38.33 of this code;

24. In the event that the judge orders the defendant to repay a reward or part of a reward under Articles 37.073 and 42.152 of this code, a statement of the amount of the payment or payments required to be made; and

25. In the event that the court orders restitution to be paid to the victim of a felony, a statement of the amount of restitution ordered and:

(A) the name of the victim and the permanent mailing address of the victim at the time of the judgment; or

(B) if the court determines that the inclusion of the victim's name and address in the judgment is not in the best interest of the victim, the name and address of a person or agency that will accept and forward restitution payments to the victim.

Sec. 2. The judge may order the clerk of the court, the prosecuting attorney, or the attorney or attorneys representing any defendant to prepare the judgment, or the court may prepare the same.

Sec. 3. The provisions of this Article shall apply to both felony and misdemeanor cases.

Sec. 4. The Office of Court Administration of the Texas Judicial System shall promulgate a standardized felony judgment form that conforms to the requirements of Section 1 of this article. A copy of the promulgated form shall be mailed to all district courts hearing criminal cases on or before October 1, 1985.

C) TEX. CODE CRIM. PROC. ANN. art. 42.12, §§ 3 and 4 provide:

Art. 42.12. Adult Probation

Sec. 3. Court Ordered Probation. The judges of the courts of the State of Texas having original jurisdiction of criminal actions, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public as well as the defendant will be subserved thereby, shall have the power, after conviction or a plea of guilty or nolo contendere for any crime or offense, where the maximum punishment assessed against the defendant does not exceed ten years imprisonment, to suspend the imposition of the sentence and may place the defendant on probation or impose a fine applicable to the offense committed and also place the defendant on probation as hereinafter provided. Except as otherwise provided by this section, in all felony cases where the punishment is assessed by the Court it may fix the period of probation without regard to the term of punishment assessed, but in no event may the period of probation be greater than 10 years or less than the minimum prescribed for the offense for which the defendant was convicted. In a misdemeanor case in which confinement is imposed by the court or in a third-degree felony case punished under Section 12.34(a)(2), Penal Code, the period of probation shall be for a period of time not to exceed the maximum confinement applicable to the offense or two years, whichever period is greater. Any such person placed on probation, whether in a trial by jury or before the court, shall be under the supervision of such court.

* * *

Sec. 4. Jury Recommended Probation. (a) When there is a felony conviction in any court of this State and the punishment assessed by the jury shall not exceed ten years, the jury may recommend probation for a period of any term of years authorized for the offense for which the defendant was convicted, but in no event for more than ten years, upon written sworn motion made therefor by the defendant, filed before the trial begins. When the jury recommends probation, it may also assess a fine applicable to the offense for

which the defendant was convicted. When the trial is to a jury, and the defendant has no counsel, the court shall inform the defendant of his right to make such motion, and the court shall appoint counsel to prepare and present same, if desired by the defendant. In no case shall probation be recommended by the jury except when the sworn motion and proof shall show, and the jury shall find in their verdict that the defendant has never before been convicted of a felony in this or any other State. This law is not to be construed as preventing the jury from passing on the guilt of the defendant, but he may enter a plea of not guilty. In all eligible cases, probation shall be granted by the court, if the jury recommends it in their verdict, for the period recommended by the jury. This section does not apply to a defendant adjudged guilty of an offense under Section 481.122, Texas Controlled Substances Act (Chapter 481, Health and Safety Code), if it is shown on the trial of the offense that the defendant was 21 years of age or older at the time the offense was committed by his own conduct.

(b) Where there is a misdemeanor conviction in any court of this state and the punishment assessed by the jury shall be by imprisonment in jail or by a fine or by both such fine and imprisonment, the jury may recommend probation for a period of time not to exceed two years, upon sworn motion made therefor by the defendant, filed before the penalty stage of the trial begins. When the jury recommends probation, it may recommend that the imprisonment or fine or both such fine and imprisonment found in its verdict may be probated. When the trial is to a jury and the defendant has no counsel, the court shall inform the defendant of his right to make such motion, and the court shall appoint counsel to prepare and present same, if desired by the defendant. In no case shall probation be recommended by the jury except when the defendant, before the trial began, had filed a sworn statement that the defendant has never before been convicted of a felony, and after conviction and before the penalty stage of the trial began, the defendant shall have filed a sworn motion for probation and the proof shall show and the jury shall find in their verdict that the defendant has never before been convicted of a felony in this or any other state. This law is not to be construed as preventing the jury from passing on the guilt of the defendant, but the defendant may enter a plea of not guilty. In all eligible cases, probation shall be granted by the court, if the jury recommends it in their verdict.

(c) This section does not prohibit a court from granting probation in a case if the jury in the case does not recommend probation.

D) TEX. CODE CRIM. PROC. ANN. art. 42.12 § 23 provides:

Sec. 23. Reduction or Termination of Probation. At any time, after the defendant has satisfactorily completed one-third of the original probationary period or two years of probation, whichever is the lesser, the period of probation may be reduced or terminated by the court. Upon the satisfactory fulfillment of the conditions of probation, and the expiration of the period of probation, the court, by order duly entered, shall amend or

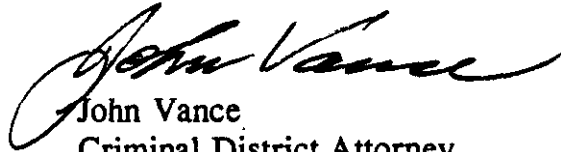
3. Summary:

As you can see from the enclosed memorandum and letter from Mr. Tyler, the answer to the question presented turns primarily upon whether the prior conviction mentioned in § 46.05, P.C. must be a "final" conviction (similar to the finality required for enhancement pursuant to TEX. PENAL CODE ANN. § 12.42) in order to limit the actor's right to possess a firearm or whether any conviction for a felony involving violence will trigger application of § 46.05, despite the fact that the defendant was discharged from his prior probation.

My assistants have consulted the relevant annotations of the Black Statutes but have found no cases that answer the question presented. Both Mr. Burnham and Mr. Tyler have rather thoroughly researched the question without finding a case on point.

Thank you for your assistance in this matter.

Sincerely,


John Vance
Criminal District Attorney
Dallas County, Texas

JV/JBK/rf

Enclosures

- 1) Letter from Bobby S. Tyler, Assistant Chief Counsel, ATF Dallas
- 2) Copy of memorandum by Jim Burnham, Attorney at law, Dallas, Texas

cc: 1) Bobby Tyler
2) Jim Burnham